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13 THE THOMAS KINKADE COMPANY

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 DAVID KAYNE, an individual citizen of
18 Georgia,

19 Plaintiff,

20 v.

21 THE THOMAS KINKADE COMPANY,
22 formerly known as MEDIA ARTS
23 GROUP, INC., a Delaware Corporation,,

24 Defendant.

CASE NO. C 07-4721 (SI)

**DEFENDANT THE THOMAS KINKADE
COMPANY'S NOTICE OF MOTION AND
MOTION FOR SANCTIONS PURSUANT
TO F.R.C.P. RULE 11; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF; AND DECLARATION OF
CHARLES E. WEIR**

**DATE: March 21, 2008
TIME: 9:00 a.m.
JUDGE: Hon. Susan Illston
DEPT.: 10, 19th Floor**

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on March 21, 2008 at 9:00 a.m., or as soon thereafter as
3 the matter may be heard, in the courtroom of the Honorable Susan Illston, located at 450 Golden
4 Gate Avenue, San Francisco, California, Plaintiff The Thomas Kinkade Company ("TKC") will
5 and hereby does move, pursuant to Federal Rule of Civil Procedure 11 for an order granting
6 sanctions against Plaintiff David Kayne and his counsel.

7 This Motion is, and will be, based on the following grounds: Kayne's claims are all barred
8 by res judicata. Kayne previously sought and was denied the same relief he seeks here, in a prior
9 action he commenced against TKC in the Northern District of Georgia. Further, Kayne's claims
10 are meritless. Kayne bases his claims for violation of Section 17200 and his unconscionability
11 theory on allegations that TKC failed to comply with certain requirements of California Franchise
12 Investment Law and Federal Trade Commission regulations applicable to franchisors. Kayne's
13 claims that TKC violated the California Franchise Investment Law are barred by collateral
14 estoppel. This issue was litigated by the parties and rejected by an arbitration panel. Kayne's
15 attempts to bring this action on such bases are without merit and warrant the imposition of
16 sanctions.

17 This Motion is based on this Notice of Motion, the accompanying Memorandum of Points
18 and Authorities, the Declaration of Charles E. Weir in Support of The Thomas Kinkade
19 Company's Motion for Sanctions Pursuant to F.R.C.P. Rule 11, the pleadings and record on file in
20 this action, and such oral argument as may be presented at the hearing on this Motion.

21 Dated: November 26, 2007

22 McDERMOTT WILL & EMERY LLP
23 DANA N. LEVITT, PC
24 CHARLES E. WEIR
25 JASON D. STRABO

26 By: /s/
27 Charles E. Weir
28 Attorneys for Defendant
THE THOMAS KINKADE COMPANY

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McDERMOTT WILL & EMERY LLP
ATTORNEYS AT LAW
LOS ANGELES

1 Defendant The Thomas Kinkade Company (“TKC”) hereby moves, pursuant to Federal
2 Rule of Civil Procedure 11, for sanctions against plaintiff David Kayne (“Kayne”) and his
3 counsel.

4 **I. INTRODUCTION**

5 Kayne’s current complaint is simply one more cynical move in a long campaign to game
6 the legal system and to avoid his growing debts to TKC, debts which he and his company, Kayne
7 Art Galleries (“Kayne Galleries”) were ordered to pay to TKC by a three Judge AAA panel in San
8 Francisco over four years ago (the “San Francisco Arbitration”). Along the way, without regard
9 to the basic dictates of integrity, Kayne has repeatedly contradicted himself in case after case and
10 said whatever appears to be necessary to save to his skin in the circumstances. Positions
11 aggressively fought for by Kayne in one forum have been quickly set aside in favor of the exact
12 opposite argument in another forum. Since 2003, Kayne’s guiding principle in litigation with
13 TKC has been raw expediency. This latest pleading, however, is beyond the pale. It lacks all
14 merit and is such an egregious abuse of the legal system that sanctions must be awarded.

15 In this action, Kayne seeks to enjoin an AAA arbitration currently pending before
16 Pepperdine University Law School Professor Jay McCauley (the “McCauley Arbitration”) and
17 yet, he has already litigated and lost the same issue before a United States District Court in
18 Georgia. He sued TKC in the Northern District of Georgia in August of 2006 (the “Georgia
19 Action”) and sought a declaratory judgment that the same arbitration clause at issue in the
20 McCauley Arbitration is invalid and unenforceable and to enjoin the McCauley Arbitration. On
21 March 29, 2007, Judge Charles Pannell rejected Kayne’s contentions in the Georgia Action and
22 ordered the parties to arbitration. On October 3, 2007, the Eleventh Circuit confirmed Judge
23 Pannell’s order. Nevertheless, Kayne brings this current action seeking the same relief he sought
24 in Georgia. This is simply manipulation of the system. Kayne cannot be allowed to pursue the
25 same relief in court after court until he finally secures a favorable ruling. Kayne’s suit is plainly
26 barred by the principles of res judicata and Kayne and his counsel should be harshly sanctioned
27 for this latest and most egregious abuse of the legal system.
28

1 Moreover, not content simply to pursue again and again relief already denied by one
2 federal court, the vast majority of the allegations contained in the current Complaint were
3 specifically litigated and rejected in the San Francisco Arbitration. TKC initiated the San
4 Francisco Arbitration against Kayne Galleries and Kayne personally to collect on outstanding
5 debts of approximately \$600,000. Defending against TKC's collection action, Kayne asserted a
6 litany of counter-claims and defenses. Among other claims and defenses, Kayne argued (1) that
7 he was fraudulently induced to enter the Dealer Agreements on behalf of Kayne Galleries; (2) that
8 TKC breached its obligations under the Dealer Agreements with Kayne Galleries; and (3) that
9 TKC violated Federal and California franchise laws.

10 These claims were rejected in the San Francisco Arbitration and that rejection was
11 subsequently confirmed by Judge Illston of this District. Kayne nevertheless brings the same
12 claims again in this latest Complaint. Indeed, in support of his spurious claim for violation of the
13 California Business & Professions Code § 17200, Kayne relies on the same failed franchise
14 theories specifically rejected in the San Francisco Arbitration, namely that TKC failed to file an
15 offering circular and committed other disclosure violations under California and Federal law.
16 Thus, Kayne both thumbs his nose at the ruling of a federal judge in Georgia and, at the same
17 time, attempts to re-litigate issues that were lost in the San Francisco Arbitration and subsequently
18 confirmed by a different federal judge in this District.

19 Nothing demonstrates Kayne's rank opportunism so well as the numerous assertions in the
20 current Complaint that flatly contradict assertions made to other courts or in other AAA
21 proceedings. As examples only, in the Georgia Action, Kayne steadfastly maintained that the
22 arbitration clause contained in the Credit Application and Personal Guaranty (the Credit
23 Application and the Personal Guaranty will hereafter be referred to as the "Credit Application")
24 executed in favor of TKC by Kayne on October 2, 2001 was governed by Georgia law. Why? He
25 asserted that it was governed by Georgia law because he believed incorrectly that the Georgia
26 Statute of Frauds would be beneficial to his case. Now, despite vehemently claiming in the
27 Georgia Action that Georgia law applies to all questions regarding the enforceability of the Credit
28 Agreement, he now argues to this Court that the California Unfair Competition Statute and

1 California's unconscionability laws prevent enforcement of the arbitration clause in the Credit
2 Agreement.¹

3 As another example, in prior cases, Kayne claimed he could have no personal liability
4 under the Dealer Agreements with TKC because Kayne Galleries alone was the signatory to the
5 Dealer Agreements containing the arbitration clauses pursuant to which the San Francisco
6 Arbitration was initiated. Indeed, Kayne was ultimately able to convince Judge Illston that the
7 Panel in the San Francisco Arbitration was wrong to find him personally liable for the debts of
8 Kayne Galleries only because he argued that he was not individually a party to the Dealer
9 Agreements. Now, in a blatant contradiction of his earlier position, he asserts that those same
10 Dealer Agreements somehow entitle him personally to the protection of the franchise laws. Why?
11 He is now asserting that he is a franchisee (and therefore, by implication, a party to the Dealer
12 Agreements) because it has suddenly become expedient for him to do so.

13 As a final example, in the Georgia Action, Kayne urged Judge Parnell to act promptly and
14 enjoin the McCauley Arbitration because, he argued, the McCauley Arbitration was governed by
15 the AAA's expedited rules. Kayne claimed that because the expedited rules were in force, the
16 McCauley Arbitration could well conclude before Judge Pannell could act in the Georgia Action
17 in the normal course. Put another way, his request to Judge Pannell for an injunction was
18 premised on the assumption that the expedited rules were lawful and would compel prompt
19 commencement of the arbitration. Now, he claims the expedited rules are unlawful and that the
20 McCauley Arbitration must, therefore, be stopped. Why? The answer is obvious. He now
21 maintains the expedited rules are unlawful because he lost his claims in the Georgia Action. The

22
23 ¹ Similarly, in recent correspondence to the AAA concerning the appointment of an arbitrator for
24 the McCauley Arbitration, Kayne argued that Georgia law must be applied to the arbitration. In
25 an e-mail dated May 11, 2007, Kayne's lawyer wrote the following: "Further as per our phone
26 call yesterday, we reserve the right to make further objections but we find trial court judges
27 (retired or otherwise) and practitioners objectionable. Full time law professors with substantial
28 years of full-time professorial experience in appropriate areas of federal law, conflicts of laws,
Georgia Law (which is the controlling applicable law in this matter), and contract law are the
kinds of persons appropriate for this matter. Someone who does not have a bias towards
California rules, laws, and procedures whether such bias is by experience and training being only
in or substantially in California courts and California laws or otherwise." (emphasis added.)
Declaration of Charles E. Weir in Support of TKC's Motion for Sanctions (the "Weir Rule 11
Decl.") Ex. 6, p. 15.

list goes on and on, but enough is finally enough. This cynical manipulation of the legal system by Kayne and his counsel must be punished and punished harshly.

II. STATEMENT OF FACTS²

A. Background of the Parties

Thomas Kinkade is a world renowned artist. TKC produces, markets and distributes Mr. Kinkade's artwork through various distribution channels. One of these distribution channels is known as the "Thomas Kinkade Signature Gallery Program." Complaint ¶ 11.

Kayne is the owner and President of Kayne Galleries. Kayne and Kayne Galleries owned and operated a number of Signature Galleries in the Atlanta area. Kayne opened his first Signature Gallery in 1998 and his last in 2001. *Id.* ¶ 9. While no longer affiliated with TKC, Kayne continues to operate at least one gallery in the Atlanta area. The gallery sells the works of various artists.

B. The Parties' Contractual Relationship

1. The Dealer Agreements

TKC, Kayne and Kayne Galleries entered into numerous agreements. Included in these various agreements were seven different Signature Gallery Dealer Agreements which authorized Kayne Galleries to open and operate the Kinkade galleries (the "Dealer Agreements"). *Id.* ¶ 13.

2. The Credit Agreements

TKC, Kayne and Kayne Galleries entered into two credit agreements. The first was between Kayne personally and TKC and was dated April 17, 1998. The second credit agreement is the October 2001 Credit Agreement that is the subject of this case. Contrary to Kayne's absurd "contract of adhesion" argument, TKC would prefer not to act as a banker for its dealers. However, as an accommodation, TKC permitted its dealers, including Kayne, to make purchases on credit. In order to determine the credit worthiness of its dealers TKC required them to execute credit applications. Based on the information in a given credit application, TKC would determine

² To ensure compliance with the Rule 11 safe harbor requirements, TKC felt it necessary to include a full set of background facts. Unfortunately, this makes the factual background largely duplicative of the factual background contained in TKC's Motion to Dismiss. For the same reason, some arguments contained hereing are also duplicative of arguments in the Motion to Dismiss. TKC apologizes for the repetition.

1 how much credit it was willing to extend. In October 2001, Kayne signed and returned an
 2 application for credit for Kayne Galleries and the Personal Guaranty. *Id.* ¶ 31. The Personal
 3 Guaranty made Kayne personally liable for the debts of Kayne Galleries. Thereafter, TKC
 4 extended some \$600,000 in credit to Kayne Galleries. Kayne has maintained in the Georgia
 5 Action (unsuccessfully) and again pleads in this case, that while he agreed to the terms of the
 6 Credit Agreement and Personal Guaranty, TKC (despite granting Kayne Galleries \$600,000 in
 7 credit) never agreed to the terms. Complaint ¶ 32; Request for Judicial Notice and Declaration of
 8 Charles E. Weir in Support of Defendant's Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6)
 9 (hereinafter, "Weir Motion to Dismiss Decl.") Ex. 12, p. 182-183. Accordingly, Kayne claims
 10 that he does not have to pay TKC. As discussed below, this contention was rejected by Judge
 11 Pannell in the Georgia Action. Judge Pannell found that the Credit Agreement and Personal
 12 Guaranty was formed and that the arbitration provision was valid and binding. This order was
 13 later affirmed by the Eleventh Circuit.

14 **C. Kayne and Kayne Galleries Default on Their Obligations to TKC**

15 In late 2002, Kayne Galleries and Kayne were delinquent in their payments to TKC.
 16 Because of these delinquencies, TKC terminated the contracts with Kayne and Kayne Galleries
 17 and initiated the San Francisco Arbitration. Complaint ¶¶ 34-35.

18 **D. History of Disputes Between Kayne and TKC**

19 1. The San Francisco Arbitration

20 In late 2002, TKC initiated the San Francisco Arbitration against Kayne and Kayne
 21 Galleries to recover approximately \$600,000. *Id.* ¶ 35. Kayne Galleries counterclaimed in the
 22 arbitration, seeking millions of dollars in damages based on multiple causes of action, including
 23 alleged breaches of contract, fraud and violations of franchise law. Weir Motion to Dismiss Decl.
 24 Exs. 1, 2, p. 11-12, 19-44. The franchise law claims are particularly relevant here as Kayne bases
 25 the current Section 17200 claim and unconscionability theory on alleged violations of franchise
 26 law. The counterclaim in the San Francisco Arbitration alleged that "Media Arts³ violated the
 27 California Franchise Investment law in entering the franchise agreement with [Kayne Galleries]."

28 ³ TKC was formerly known as Media Arts.

1 Weir Motion to Dismiss Decl. Ex. 1, p. 12, ¶ 39. Further, TKC was specifically alleged to have
 2 violated the Federal Trade Commission Act and the Code of Federal Regulations. *Id.* at ¶¶ 29, 34.
 3 Kayne argued that the dealer agreements were actually franchise agreements. Kayne's opening
 4 brief contains the following statements:

5 "Media Arts is likely to vigorously contest its status as a franchisor, however if it walks
 6 like a duck, quacks like a duck, swims like a duck, and meets the legal definition of a
 7 duck, it's a duck.

8 * * *

9 The dealer agreements at issue here are actually franchise agreements, and the Kayne
 10 galleries are indeed franchises under those agreements."

11 Weir Motion to Dismiss Decl. Ex. 2, p. 26-27.

12 Kayne went on to argue in the San Francisco arbitration that "it is undisputed that [TKC]
 13 did not register as a franchise and that [TKC] did not provide franchise disclosures to Counter-
 14 claimants. Therefore, [TKC] is liable to Counter-claimants for damages in connection with the
 15 failure to disclose as well as in connection with the misrepresentation made to Counter-claimants
 16 in the course of selling the franchise to counterclaimants." *Id.* at p. 29. In this case, Kayne seeks
 17 injunctive relief based upon the identical "failure to disclose" and "failure to register" theories.
 18 He makes the same argument here that he made in the San Francisco Arbitration

19 On August 27, 2004 the majority of the Panel in the San Francisco Arbitration rejected all
 20 of Kayne's counterclaims. The Panel's award provided as follows:

21 7. Respondent's 39 paragraph counterclaim contains some 16 major factual conclusions,
 22 all of which were vigorously contested in this arbitration, and it contains at least as many
 23 separate causes of action, including breach of the covenant of good faith and fair dealing,
 24 unfair competition, anti-trust, RICO, Federal Trade Commission Rules & Regulations,
 25 illegal termination, tortuous [sic] interference with business relations, 'tortuous
 26 interference with business expectancy-inspective economic advantage (sic)' fraudulent
 27 disclosure, price discrimination, etc.
 28

8. By the close of evidence Respondent's causes of action had been pared to six: (1) the dealer agreement is unconscionable (so its provisions barring consequential and punitive damages is void); (2) Sherman Anti-Trust Act & Clayton Act; (3) Unfair Trade Practices Act; (4) Interference with Prospective Economic Advantage; (5) Fraud; and (6) California franchise [sic] Act.

9. **Respondent has not proven by a preponderance of evidence the elements of even one of these causes of action. For example, absolutely no evidence was introduced concerning what disclosures Claimant failed to make in violation of the California Franchise Act...**

(emphasis added) Weir Motion to Dismiss Decl. Ex. 3; p. 50.

In addition to rejecting all of Kayne's counterclaims, the three-judge arbitration panel awarded TKC \$588,555 for art that was ordered by Kayne Galleries and delivered by TKC but never paid for. The arbitration panel further found that the Personal Guaranty contained in the Credit Agreement was binding and enforceable on Kayne and that he was personally liable for the debts of Kayne Galleries. Indeed, the Panel specifically noted in its "Reasons for Award" that Kayne testified that he signed the personal guarantee provisions and that he "'now' understands his obligation under those provisions." Weir Motion to Dismiss Decl. Ex. 3; p. 50.

2. **Kayne Begins a Campaign Against TKC and its Dealers to Pressure TKC into Settlement**⁴

Rather than pay his established debts to TKC, following the arbitration ruling, Kayne launched a campaign of threats to pressure TKC into a settlement. On October 28, 2004, Kayne put his plan into action by sending a lengthy e-mail to certain TKC Signature Dealers. The e-mail threatened that if TKC did not settle with Kayne he would take various actions that would "have severe adverse financial consequences for the members of SDA, other TK SIGs, and TK itself..."

⁴ TKC includes this section as background in response to Kayne's discussion of prior litigation between the parties referred to as "Kayne II" and "Kayne III" in the current Complaint. While neither case has anything to do with the claims Kayne brings in this case and should be stricken, the true facts surrounding the genesis of those actions shed important light on the lengths Kayne has gone to avoid his debts. Accordingly, TKC includes this short section to rebut Kayne's erroneous allegations regarding the timing of the two actions and his ridiculous insinuation that he is somehow being victimized by TKC.

1 Weir Rule 11 Decl. Ex. 1. Kayne further threatened to make false and disparaging comments
 2 about Mr. Kinkade and about his art. Kayne threatened a consumer class action.⁵ He also
 3 threatened to ruin special events held by Kinkade dealers. *Id.*

4 Kayne made good on his threats and it led to what Kayne refers to as “Kayne II” and
 5 “Kayne III” in his Complaint. “Kayne II” was a case of blatant copyright infringement. Without
 6 permission, Kayne hired artists to “highlight” Kinkade paintings. The conduct in “Kayne III” was
 7 even more egregious. Kayne misappropriated Mr. Kinkade’s name and likeness on a
 8 “liquidation” website. The website contained disparaging comments about Mr. Kinkade’s
 9 painting techniques. Finally, Kayne hired a billboard truck to drive in the parking lots
 10 surrounding various Kinkade events. The billboards used Kinkade trademarks and referred
 11 Kinkade customers to Kayne’s disparaging “liquidation” website. Both cases settled with Kayne
 12 agreeing never again to engage in the same conduct. Weir Rule 11 Decl. ¶ 9.

13 3. The Arbitration Award Against Kayne Galleries is Confirmed

14 After securing its arbitration award in the San Francisco Arbitration against Kayne and
 15 Kayne Galleries, TKC moved to confirm the award in the Northern District of California.
 16 Complaint ¶ 37. In response, Kayne moved to vacate the award against him as an individual on
 17 the ground that he was not a party to the Dealer Agreements that contained the arbitration clauses
 18 pursuant to which the San Francisco Arbitration was initiated. *Id.* Specifically, Kayne argued that
 19 disputes under the Credit Agreement and Personal Guaranty had to be arbitrated under the AAA
 20 expedited rules, before a single arbitrator, in Santa Clara County. Weir Motion to Dismiss Decl.
 21 Ex. 6, pp. 75-77. The San Francisco Arbitration initiated under the Dealer Agreements on the
 22 other hand, involved a lengthy and full evidentiary hearing before a three-judge panel. The
 23 District Court confirmed the award against Kayne Galleries, but agreed with Kayne with respect
 24 to the Personal Guaranty and vacated the award against him personally. Weir Motion to Dismiss

25 _____
 26 ⁵ In his e-mail Kayne made the claim that TKC and its dealers were defrauding consumers and
 27 would eventually face liability for punitive damages for the failure to disclose that Mr. Kinkade
 28 did not in fact create his own art. Curiously, while Kayne was making this ludicrous allegation,
 he was also selling Kinkade art and still is to this day. Obviously, Kayne never believed his own
 lies.

Decl. Ex. 8; 87-90. The District Court found that because the arbitration procedures called for in the Credit Agreement and Personal Guaranty were not followed, the San Francisco Arbitration Panel did not have the authority to hold him individually liable.⁶ *Id.* at 88.

4. TKC Initiates Arbitration Proceedings Under the Credit Agreement

Following the District Court's order vacating the award against Kayne, on July 10, 2006 TKC initiated arbitration proceedings pursuant to the terms of the Credit Agreement and Personal Guaranty. Complaint ¶ 42; Weir Motion to Dismiss Decl. Ex. 12, p. 185. Unfortunately, Kayne's procedural shell game was just beginning. Initially, Kayne responded by refusing to arbitrate, asserting in a letter to the AAA dated August 14, 2006, that there was no agreement to arbitrate and that Kayne never signed the Credit Agreement. Weir Rule 11 Decl. Ex. 3. When this letter to the AAA was being written, however, Kayne apparently had forgotten his testimony under oath in the San Francisco Arbitration as well as his declaration under penalty of perjury submitted to the Northern District of California. In his testimony and in his Declaration he admitted he signed the Credit Agreement. Weir Motion to Dismiss Decl. Ex. 7, p. 83. Kayne's current counsel, Mr. Gary Britt, also made various threats against the AAA, TKC and TKC's counsel. Specifically, he threatened to sue the AAA, TKC and TKC's counsel if they continued with the arbitration. Weir Rule 11 Decl. Exs. 3, 4. TKC's attorney rejected these threats and responded to the AAA that TKC would continue with the arbitration exactly on the terms set forth in the Credit Agreement and Personal Guaranty. Weir Rule 11 Decl. Ex. 5.

5. Kayne Seeks to Enjoin the Arbitration Under the Credit Agreement

When his threats failed to intimidate TKC, Kayne filed the Georgia Action and sought to enjoin the McCauley Arbitration initiated pursuant to the Credit Agreement and Personal Guaranty. TKC agreed to stay the McCauley Arbitration until the Georgia Action could be

⁶ Once TKC initiated the arbitration at issue in this case under the expedited procedures called for in the Personal Guaranty, Kayne shifted course and now claims that he is entitled a full evidentiary hearing. Kayne, however, had his full hearing and lost. In an effort to avoid that loss, he argued to Judge Illston that his liability under the Personal Guaranty had to be determined pursuant to the arbitration procedures set forth in the Credit Agreement and Personal Guaranty. TKC followed Kayne's suggestion and initiated an arbitration under the AAA's expedited rules, in Santa Clara County before a single arbitrator. Kayne now claims that such procedures are unfair and he is entitled to a full hearing. At some point, this procedural gamesmanship must stop.

1 decided. TKC filed a motion in the Georgia Action to compel arbitration on the grounds that the
2 Credit Agreement and Personal Guaranty (a document which Kayne admits he executed)
3 contained a valid and enforceable arbitration clause. In response, Kayne asserted that the Credit
4 Agreement and Personal Guaranty and the arbitration provision were invalid and void. Kayne
5 argued that the Credit Agreement and Personal Guaranty were: (1) not supported by consideration,
6 (2) were never accepted by TKC, and (3) were in violation of the Georgia Statute of Frauds.
7 Kayne also argued that the arbitration clause did not cover disputes relating to the Personal
8 Guaranty. Complaint ¶ 43.

9 In support of his petition for injunctive relief Kayne argued that the Georgia court must act
10 quickly to enjoin the proceeding because of the AAA's expedited rules. Specifically, Kayne
11 alleged that "The American Arbitration Association's expedited rules allow for only one arbitrator
12 and do not allow for any hearing requiring witness production....As a decision may be reached by
13 the arbitrator at anytime, Kayne will suffer irreparable and immediate harm if Defendant is
14 allowed to proceed with this arbitration prior to this Court's determination of the arbitrability of
15 this case." Weir Motion to Dismiss Decl. Ex. 12, pp. 193-194.

16 On March 29, 2007 Judge Charles Pannell of the Northern District of Georgia rejected
17 each of Kayne's defenses to the enforcement of the arbitration clause and compelled the parties to
18 arbitration. Kayne appealed Judge Pannell's ruling to the Eleventh Circuit. Weir Motion to
19 Dismiss Decl. Ex. 13.

20 6. Pursuant to the District Court's Order TKC Proceeds with the Arbitration

21 No stay of Judge Pannell's order was requested or entered. Accordingly, on April 5, 2007,
22 TKC contacted the AAA and informed them that the arbitration should proceed. Weir Rule 11
23 Decl. Ex. 5. In response, Kayne again raised the same objections that were made to Judge
24 Pannell. Kayne urged the AAA and the arbitrator to stay the arbitration in contravention of Judge
25 Pannell's Order. Kayne's counsel also resumed his practice of threats against TKC and the AAA.
26 These included a profanity-laced tirade against TKC's counsel wrongfully accusing TKC's
27 counsel of unethical behavior. Weir Rule 11 Decl. Ex. 7. Fortunately, Professor McCauley⁷,

28 ⁷ Mr. McCauley was jointly selected by the parties to act as the arbitrator in the matter.

properly concluded that he was required to comply with Judge Pannell's Order and he set the matter for hearing consistent with the parties' arbitration agreement. Weir Motion to Dismiss Decl. Ex. 15. This action followed.

E. Kayne's Allegations in this Action

While Kayne purports to bring "new" claims unrelated to the allegations he brought in prior proceedings, he, in fact, seeks the same relief he sought in the Georgia Action. Specifically, he now seeks (as he did in the Georgia Action) a declaratory judgment that the arbitration clause in the Credit Agreement and Personal Guaranty is not enforceable and that the arbitration initiated by TKC on July 10, 2006 should be enjoined. Complaint ¶¶ 54-71.

Kayne's Complaint contains a litany of irrelevant allegations almost all of which have been found to be untrue in prior litigation between the parties. When the false and irrelevant allegations are stripped away, Kayne's actual claims for relief are based on two very thin theories. The first is that the arbitration clause is unconscionable because it incorporates the AAA's expedited procedures and requires that evidence be submitted to the arbitrator in written form as opposed to live witnesses. The second theory is that TKC violated California Business & Professions Code § 17200 because it violated California and Federal franchise law by not registering as a franchisor and not making required disclosures. *Id.* ¶¶ 65-69. While Kayne does not actually bring a franchise law claim (because he cannot for reasons discussed herein and in TKC's Motion to Dismiss), Kayne claims that TKC has committed an "unlawful" act in violation of California Business & Professions Code § 17200. Kayne claims that if TKC had not have violated the franchise laws, it would have been required to disclose to Kayne in an "offering circular" that the AAA's expedited rules apply to disputes and that, armed with the disclosure, he never would have entered into the contract. *Id.* ¶¶ 22, 29. Thus, Kayne claims he is entitled to declaratory relief and an injunction stopping the arbitration initiated on July 10, 2006. While the 17200 claim fails for multiple reasons, it is most obviously a failure because it is premised on the absurd notion that Kayne could not understand the all caps arbitration language in the two page Credit Agreement and Personal Guaranty, but somehow would have understood the same language if it had been placed in an "offering circular." Fortunately, the Court will never have to

1 reach Kayne's highly contrived argument as the claims fail for many other reasons discussed in
2 this motion and in TKC's Motion to Dismiss filed on October 4, 2007.

3 **III. KAYNE AND HIS COUNSEL SHOULD BE SANCTIONED**

4 Filing a pleading with the Court is a representation that "(1) it is not being presented for
5 any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the
6 cost of litigation and (2) the claims, defenses, and other legal contentions therein are warranted by
7 existing law or by the establishment of new law." Fed. R. Civ. P. 11(b)(1)(2). "Rule 11 requires
8 the imposition of sanctions when a motion is frivolous, legally unreasonable, or without factual
9 foundation, or is brought for an improper purpose." *Conn v. Borjorquez*, 967 F.2d 1418, 1420 (9th
10 Cir. 1992). A "frivolous" filing is "both baseless and made without reasonable and competent
11 inquiry." *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990). The Court
12 is required to apply an objective standard in determining if an attorney made a filing that was
13 frivolous or without a reasonable inquiry. *Id.* When "a complaint is the primary focus of Rule 11
14 proceedings, a district court must conduct a two-prong inquiry to determine (1) whether the
15 complaint is legally or factually baseless from an objective perspective, and (2) if the attorney has
16 conducted a reasonable and competent inquiry before signing and filing it." *Holgate v. Baldwin*,
17 425 F.3d 671, 676 (9th Cir. 2005).

18 Where, as here, a party knowingly brings claims that are precluded by the order of another
19 court, it shows both a lack of respect for the authority of the first court and a lack of respect for the
20 limited time and resources of the second court. It is, in short, a double affront to the judicial
21 system that must be deterred by sanctions. Indeed, courts routinely sanction parties and their
22 counsel where the claims are plainly barred by res judicata and collateral estoppel principals.
23 *Buster v. Greisen*, 104 F.3d 1186, 1189-90 (9th Cir. 1997) (affirming order of sanctions against
24 plaintiff and his attorney where they sought to "relitigate issues that were conclusively resolved in
25 the prior suit," and ordering plaintiff to pay defendants' attorneys fees expended in moving to
26 dismiss the case); *West Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1527 (9th Cir.
27 1990) (affirming order of sanctions, including payment of defendants' attorneys fees, where
28 plaintiff "raise[d] issues precluded from relitigation by collateral estoppel"); *Huettig & Schromm*,

1 *Inc. v. Landscape Contractors Council*, 790 F.2d 1421, 1427 (9th Cir. 1986) (affirming order of
 2 sanctions against plaintiff, including “the reasonable attorneys’ fees incurred for the defense of the
 3 action”, where plaintiff’s claims were found to be barred by collateral estoppel); *Grantham v.*
 4 *U.S.*, Case No. SA CV89-755 AHS(RWR), 1990 U.S. Dist. LEXIS 11568, at *9-10 (C.D. Cal.
 5 Apr. 20, 1990) (ordering plaintiff to pay defendant’s attorneys’ fees as sanctions in light of the
 6 fact that “Plaintiff has essentially attempted to relitigate [a prior] action,” resulting in the “waste
 7 of precious judicial resources”); *Chestnutt v. Horizon Air Indus., Inc.*, Nos. CS-90-0058-JLQ, CS-
 8 90-0043-JLQ, 1990 U.S. Dist. LEXIS 15083, at *7-11 (E.D. Wash. May 16, 1990) (imposing
 9 sanctions where plaintiff’s claims were barred by res judicata and collateral estoppel and,
 10 accordingly, ordering plaintiff and his attorneys “to pay, jointly and severally, the defendants’
 11 reasonable attorneys’ fees in defending this action”); *Damiani v. Adams*, 657 F. Supp. 1409, 1418
 12 (S.D. Cal. 1987) (imposing sanctions where plaintiff had “presented legal arguments already
 13 aired, and rejected, in numerous other lawsuits.”); *See also G & T Terminal Packaging Co., Inc. v.*
 14 *Consolidated Rail Corp.*, 719 F. Supp. 153, 161 (S.D.N.Y. 1989) (granting Rule 11 sanctions
 15 against plaintiffs where “a reasonable inquiry should have warned them that they could not
 16 relitigate this claim given the familiar doctrines of res judicata and collateral estoppel”). *Surface*
 17 *v. Commerce Bank of Hutchinson*, No. 85-4092-R, 1990 WL 129218, at *3 (D. Kan. Aug. 17,
 18 1990) (holding that “plaintiffs’ counsel’s decision to continue to litigate this [federal] case after
 19 the [issuance of a preclusive] state court decision requires that attorneys’ fees be awarded under §
 20 1927 . . . The decision to continue with litigation in this case can only be characterized as
 21 unreasonable and vexatious in light of overwhelming authority indicating that plaintiffs’ claims
 22 were precluded by the doctrines of res judicata and collateral estoppel. The fact that defendants
 23 were required to file a motion for summary judgment based on collateral estoppel and res judicata
 24 is absurd.”).

25 As discussed in detail below, Kayne’s “new” claims are not “new” at all and they are
 26 plainly barred by prior litigation. Sanctions should be issued against Kayne and his counsel for
 27 the repeated attempt to game the system.
 28

1 **A. Kayne's Claims Are Plainly Barred by Res Judicata**

2 The doctrine of res judicata is well-established. It bars a party from bringing a claim if a
3 court has rendered final judgment on the merits of the claim in a previous action involving the
4 same parties or their privies. *In re International Nutronics, Inc.*, 28 F.3d 965, 969 (9th Cir. 1994)
5 (doctrine of claim preclusion barred bankruptcy trustee from asserting antitrust claim where the
6 trustee could have raised antitrust issues at prior hearings). "Res judicata bars all grounds for
7 recovery that could have been asserted, whether they were or not, in a prior suit between the same
8 parties on the same cause of action." (internal citations omitted) *Id.*; *Brown v. Felsen*, 442 U.S.
9 127, 131 (1979) ("[r]es judicata prevents litigation of all grounds for, or defenses to, recovery that
10 were previously available to the parties, regardless of whether they were asserted or determined in
11 the prior action"); *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974) (compulsory
12 counterclaim that was not asserted was barred in future actions); *International Union of Operating*
13 *Eng'rs, v. Karr*, 994 F. 2d 1426, 1430-1431 (9th Cir. 1993) (claim for underpayment of pension
14 funds was barred by prior action which sought to collect delinquent payments to funds); *C.D.*
15 *Anderson & Co. v. Lemos*, 832 F. 2d 1097, 1099-1100 (9th Cir. 1987) (where parties had a
16 contract requiring "any dispute...between the parties to be arbitrated," an arbitral award granted in
17 customer's claim for return of deposits and forgiveness of debt for certain stock transactions
18 precluded broker from subsequently asserting securities fraud and RICO claims arising from same
19 transaction).

20 The Ninth Circuit applies a four part test to determine whether successive suits involve the
21 same cause of action: (1) whether rights or interests established in the prior judgment would be
22 destroyed or impaired by prosecution of the second action; (2) whether substantially the same
23 evidence is presented in the two actions; (3) whether the two suits involve infringement of the
24 same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *In re*
25 *International Nutronics, Inc.*, 28 F.3d at 969. Of these factors, the fourth factor, i.e., whether the
26 two suits arise out of the same transactional nucleus of facts it the most important. *Id.*; *C.D.*
27 *Anderson & Co. v. Lemos*, 832 F. 2d at 1099-1100 (9th Cir. 1987).

1 Kayne's newest Complaint clearly meets each of these elements. In the Georgia Action,
2 Kayne sought an order declaring that the arbitration provision contained in the Credit Agreement
3 and Personal Guaranty was invalid and unenforceable. Weir Motion to Dismiss Decl. Exs. 10, 12,
4 pp. 124, 186-191. Kayne also asked the Georgia court to enjoin the arbitration commenced by
5 TKC on July 10, 2006 on the grounds that there was no valid agreement to arbitrate. Weir Motion
6 to Dismiss Decl. Ex. 12, pp. 193-194. In this action, Kayne asks the Court to declare that the
7 exact same arbitration provision is invalid and unenforceable – the exact relief that was denied in
8 the Georgia Action. Complaint ¶ 60. Kayne also asks this Court to enjoin the same arbitration
9 commenced by TKC on July 10, 2006 – again, the exact relief that was denied in the Georgia
10 Action. *Id.* at ¶¶ 64, 71.

11 Turning specifically to the elements, there is no doubt that each element is met and that
12 Kayne's current Complaint is patently frivolous. First, it is clear this second action would
13 “destroy the prior judgment.” Kayne is simply asking this Court for the same relief that was
14 denied by the Georgia court when it compelled arbitration. Second, not only will “substantially
15 the same evidence” be presented, but the identical evidence will be presented. Both cases are and
16 were about the enforceability of the exact same agreement. Third, exactly the same rights are at
17 issue, namely whether Kayne must arbitrate with TKC pursuant to the arbitration provisions of the
18 Personal Guaranty. Finally, and again obviously, the two suits arise out of the same transactional
19 nucleus of facts. Each suit involves exactly the same agreement and seeks exactly the same relief.

20 Ironically, while the doctrine of res judicata obviously bars Kayne's current claims, there
21 are numerous instances in this case where Kayne asserts the exact opposite of what he asserted in
22 Georgia. Thus, not only does Kayne seek to undermine the policies associated with res judicata,
23 he would have this Court impose the unfair burden on TKC of having to defend two separate
24 actions in which Kayne takes diametrically opposite positions. Indeed, as the table below
25 illustrates, Kayne made a series of tactical decisions in the Georgia Action that are now
26 inconvenient to his current goals (inconvenient because he was unsuccessful in the Georgia
27 Action) and which he now simply disavows. Thus, because of this bad faith and gamesmanship,
28 the application of res judicata is particularly just.

<u>California Action</u>	<u>Georgia Action</u>
Asserts that California law applies to the interpretation of the contract because Kayne apparently prefers California's unconscionability rules. Complaint, <i>en passim</i> . ⁸	Asserted that California law does not apply, but that Georgia law applies because Kayne concluded that the Georgia Statute of Frauds worked to his advantage. Weir Motion to Dismiss Decl. Ex. 10, pp. 128-130.
Asserts that the AAA's Expedited Rules do not prevent a hearing with witnesses because Kayne believes that it helps his unconscionability arguments. Complaint ¶ 6.	Asserted that the AAA's Expedited Rules prevent witnesses from testifying because Kayne sought to establish the existence of exigent circumstances to support his request for a TRO. Weir Motion to Dismiss Decl. Ex. 12, pp. 193-194. ⁹
Asserts that the Dealer Agreements provide him as an individual with protections under the Franchise laws. Complaint ¶ 16.	Asserted that he individually was not a party to the Dealer Agreements because it supported his effort to show failure of consideration. Weir Motion to Dismiss Decl. Ex. 10, pp. 116-118.

1. Kayne's Attempt to Distinguish the Subject Matter of His Georgia Action and This Action is Absurd

The conduct of Kayne and counsel is made only more egregious by the fact that Kayne and his counsel are clearly aware of the principals of res judicata. Indeed, Kayne draws a totally meaningless distinction between the two actions and falsely claims he does not seek to relitigate the same issues. Specifically, Kayne asserts:

The Georgia district court and Eleventh Circuit proceedings involve the question whether there was or was not an agreement to arbitrate between TKC and David Kayne. The issues Mr. Kayne is presenting to this Court are different, and did not properly arise until it was

⁸ While Kayne is correct that California law applies to this case, it cannot be overlooked that he made the tactical decision to disavow California law in favor of Georgia law when he believed it worked to his advantage.

⁹ Kayne was correct in Georgia. The Expedited Rules do not permit witnesses. *See* Section III.C.1.a, *infra*.

1 first determined that there was, in fact, an agreement between TKC and Mr. Kayne to
2 arbitrate. The issue now presented to this Court is whether, assuming there was an
3 agreement to arbitrate under the provisions of Exhibit "A", such an agreement is
4 unconscionable and therefore unenforceable under the standards first clearly articulated by
the Ninth Circuit's *en banc* decision in *Nagrampa v. Mailcoups, Inc.*, 469 F. 3d 1257 (9th
Cir. 2006).

5 Complaint ¶ 46.

6 This purported "distinction" is fanciful and absurd, both from a legal and factual
7 standpoint. Essentially, Kayne is arguing that he can maintain two actions in two different district
8 courts regarding the enforceability of the exact same agreement, if the first action deals only with
9 the existence of the agreement while the second action purportedly deals with whether the same
10 agreement is legally valid. This is plainly wrong. *Brown*, 442 U.S. at 131; *In re International*
11 *Nutronics, Inc.*, 28 F.3d at 969 (barring "all grounds for recovery that could have been asserted,
12 whether they were or not"). When Kayne sought an injunction and a declaration from the Georgia
13 court that he did not have to arbitrate with TKC, he was obligated to bring all of his claims
14 regarding the enforceability of the asserted arbitration agreement. Further, when TKC moved to
15 compel arbitration Kayne was obligated to raise all of his defenses as to the enforcement of the
16 arbitration agreement. *Id.* This plainly includes the claims brought here, i.e. that the arbitration
17 provisions are unenforceable because they are unconscionable and violate the California Business
18 and Professions Code. Having asserted and lost the Georgia Action that the arbitration agreement
19 is unenforceable, the law is clear Kayne cannot then run to another district court seeking the same
20 relief regarding the same contract.

21 Moreover, not only is Kayne's attempted distinction legally wrong, it is factually wrong as
22 well. Kayne did, in fact, challenge the legal validity of the parties' contract in the Georgia Action.
23 Kayne argued that the Personal Guaranty violated the Georgia Statute of Frauds, and thus even if
24 an agreement had been formed, Kayne argued, it was not enforceable. Weir Motion to Dismiss
25 Decl. Ex. 12, pp. 191-192. Thus, Kayne must really be arguing that he can bring successive
26 challenges to the validity of an arbitration agreement in different courts. In Georgia, he
27 challenged the agreement's validity on Statute of Frauds grounds; now, in California, he
28

1 challenges the agreement's validity on unconscionability grounds. What is next? A challenge in
 2 Texas that the arbitration agreement is invalid because it was procured by duress?

3 2. The Timing of *Nagrampa* Does Not Help Kayne

4 Kayne's argues that he can maintain his current claims despite seeking the identical relief
 5 in Georgia, because *Nagrampa v. Mailcoups, Inc.*, 469 F. 3d 1257 (9th Cir. 2006) was decided
 6 after he presented his arguments in the Georgia Action. This argument is empty and without merit
 7 for numerous reasons. First, there is no exception to the application of res judicata in this
 8 circumstance. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (plaintiff in prior
 9 action was barred from pursuing subsequent action for same claim even though his co-plaintiffs in
 10 the prior action had successfully appealed the judgment); *Clifton v. Attorney General of State of*
 11 *California*, 997 F. 2d 660, 663 (9th Cir. 1993) (new statute permitting parole hearing every two
 12 years was not a sufficient change in circumstance to avoid claim preclusion effect of prior
 13 judgment). A party is not allowed to relitigate his case in a new forum because the law changes
 14 after a judgment was issued. *Id.*

15 Second, *Nagrampa* plainly did not make "new law" at all. It applied California
 16 unconscionability rules to an arbitration clause pursuant to a Supreme Court precedent
 17 that is forty years old. Indeed, even a superficial analysis of *Nagrampa* makes clear that
 18 there are no "new" legal principals. *Nagrampa* simply applies the rule set out in *Prima*
 19 *Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Specifically, if a party
 20 challenges the arbitration provisions in a contract it is a matter for the courts to decide; if,
 21 however, the challenge is to the validity of the agreement as a whole it is a matter for the
 22 arbitrator. *Prima Paint Corp.*, 388 U.S. at 403-404. This rule was reinforced recently by
 23 the Supreme Court in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).
 24 Kayne was fully aware of these decisions as he cited both of them to the District Court in
 25 Georgia in support of his challenge to the arbitration clause in the Credit Agreement and
 26 Personal Guaranty. Moreover, as the *Nagrampa* court's own survey of the case law
 27 reveals, jurisdictions have dealt with this precise issue in the context of an
 28 unconscionability challenge and have determined that if the challenge is to the arbitration

1 clause itself, it is a matter for the courts. *Nagrampa*, 469 F.3d at 1271-1277. Indeed,
 2 *Nagrampa* cites to Supreme Court precedent that is over ten years old stating “[i]t is well-
 3 established that unconscionability is a generally applicable contract defense, which may
 4 render an arbitration provision unenforceable. *Nagrampa*, 469 F.3d at 1280, citing
 5 *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-687 (1996). Accordingly, to the
 6 extent that Kayne is claiming that it is only with the *Nagrampa* case that he had the right
 7 to challenge an arbitration clause on unconscionability grounds, Kayne’s claim is false.

8 In addition, California courts have recognized the principal that contracts can be
 9 void because they are “unconscionable” for over one hundred years. *Boyce v. Fisk*, 110
 10 Cal. 107, 114 (1895) (discussing unconscionability as a defense to contract enforcement.)
 11 Again, even a cursory review of *Nagrampa* would have revealed to Kayne and his
 12 counsel that the *Nagrampa* court was applying long established California law regarding
 13 unconscionability. *Nagrampa*, 469 F.3d at 1280, citing *A & M Produce Co. v. FMC*
 14 *Corp.*, 135 Cal. App. 3d 473, 486 (1982). *Nagrampa* did not create new law.

15 Third, in an effort to make it appear that he could not have raised the
 16 unconscionability issue in the Georgia Action, Kayne misrepresents the timing of the
 17 *Nagrampa* decision in relation to the Georgia Action. Complaint ¶ 47. The *Nagrampa*
 18 decision was filed December 4, 2006. Judge Pannell issued his order in the Georgia
 19 Action on March 29, 2007. Kayne had nearly four months to bring the “new law” to
 20 Judge Pannell’s attention and he chose not to. Thus, even if there was a “new law”
 21 exception to the res judicata rules (which there is not) and even if *Nagrampa* actually set
 22 out “new law” (which it does not), Kayne had ample opportunity to raise the
 23 “unconscionability argument” in the Northern District of Georgia. Kayne’s “new law”
 24 argument is frivolous.¹⁰

25 ¹⁰ The fact of the matter is that Kayne specifically selected Georgia as a forum for his claims and
 26 made the tactical decision to assert that Georgia law governed the Credit Agreement and Personal
 27 Guaranty. Kayne took this position because he believed that the Georgia Statute of Frauds gave
 28 him a strong argument that the Personal Guaranty was unenforceable. Accordingly, because he
 concluded that Georgia law was favorable on the Statute of Frauds issue, he could not assert that
 California law applied and that the Georgia court should follow California’s unconscionability
 rules. Thus, *Nagrampa* was not raised in Georgia by Kayne simply because he could not have

1 **B. Kayne's Claims Are Barred by Collateral Estoppel**

2 As if the flaunting of Judge Pannell's order compelling arbitration was not enough, Kayne
3 premises his Section 17200 claim and unconscionability theory on franchise law theories that are
4 plainly barred by the doctrine of collateral estoppel.¹¹ Kayne has already lost the claim that TKC
5 violated the franchise laws. He cannot maintain a new claim based on the same failed theory.

6 "Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated
7 in previous litigation between the same parties." *Offshore Sportswear, Inc. v. Vuarnet*
8 *International, B.V.*, 114 F.3d 848, 850 (9th Cir. 1997) (quoting *Clark v. Bear Sterns & Co., Inc.*,
9 966 F.2d 1318, 1320 (9th Cir. 1992)). "Collateral estoppel, . . . , generally applies when an issue
10 finally decided in an earlier action is involved in a second action, and the parties involved in the
11 second action are bound by the first decision." *Luben Industries, Inc. v. United States*, 707 F.2d
12 1037, 1039 (9th Cir. 1983). In order to have issue preclusive effect, the following elements must
13 be met: (1) the two proceedings must involve the same issue; (2) that issue must have been
14 "actually litigated" and determined in the prior proceeding; (3) the determination of that issue
15 must have been necessary to the prior ruling; and (4) the two proceedings must involve the same
16 parties or their privies. *Animals v. Lujan*, 962 F.2d 1391, 1399 (9th Cir. 1992).

17 Each of these elements is present in this case. In the San Francisco Arbitration, Kayne
18 Galleries claimed that the Signature Dealers were actually franchisees and because TKC failed to
19 register and file the requisite "offering circular" TKC had violated the California Franchise Act.
20 Weir Motion to Dismiss Decl. Ex. 2, pp. 26-29. The California Franchise Act provides for strict
21 liability for failing to register as required. Cal. Corp. Code § 31300. Accordingly, Kayne claimed

22 _____
23 *Nagampa* and the Georgia Statute of Frauds at the same time, in other words, a purely tactical
decision.

24 ¹¹ Kayne has no franchise claims for numerous reasons. First, the four year statute of limitations
25 has run on any claims under the CFIL and Federal Trade Regulations do not have a private right
26 of action. Cal. Corp. Code § 31303; *G&R Moojestic Treats Inc. v. MaggieMoo's International,*
27 *LLC*, 2004 U.S. Dist. LEXIS 8806, *28 (S.D.N.Y. May 19, 2004) (holding that "there is no
28 private right of action to enforce the Disclosure Requirements of [16 C.F.R. § 436], or any other
regulation promulgated under the Federal Trade Commission Act"). Second, it has been
determined that Kayne Galleries, not Kayne, was the "franchisee" so a cause of action under the
franchise laws was never Kayne's to bring in the first place. Third, as discussed in more detail
herein, his company did in fact bring the claim and lost.

that the failure to register made TKC and its officers liable to Kayne. The San Francisco Arbitration panel flatly rejected the claim. Weir Motion to Dismiss Decl., Ex. 3, p. 50. The award was confirmed by Judge Illston of this district. Weir. Decl., Ex. 8. Kayne asserts exactly the same violation of the California Franchise Act in this case. Specifically, he asserts that the Signature Dealers business opportunity were franchises and that TKC failed to register and file the appropriate "offering circular." Complaint ¶¶ 15-21. It has already been decided that TKC did not violate the California Franchise Act in the manner alleged. Accordingly, such allegations cannot form the predicate to a violation of Section 17200 or unconscionability theory.

There can be no doubt that Kayne is estopped from reasserting the issue in this case as a basis for his 17200 claim and unconscionability theory. *Offshore Sportswear, Inc.*, 114 F.3d at 850. A minimal amount of inquiry into the issues decided in the First Arbitration and the law on relitigating the identical issue would have revealed to Kayne and his counsel that he was barred from basing his 17200 claim on this alleged violation of the franchise laws. Accordingly, sanctions are warranted for this additional reason. *West Coast Theater Corp.*, 897 F.2d at 1527.

IV. CONCLUSION

For the reasons stated above Kayne and his counsel should be sanctioned for filing the complaint. TKC requests that the court issue a sanction equal to the amount of attorneys fees¹² TKC was forced to expend to prepare this motion and dispose of Kayne's frivolous claims.

Dated: November 26, 2007

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DANA N. LEVITT, PC
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By: /s/
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Attorneys for Defendant
THE THOMAS KINKADE COMPANY

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¹² TKC will provide the Court with a memorandum of fees and costs upon request.